

MEMORANDUM

TO: Health Services and Development Agency Members

FROM: Jim Christoffersen, General Counsel

RE: HCA Health Services of Tennessee, Inc. d/b/a TriStar Southern Hills Medical Center Emergency Department at I-65

Request for HSDA Review of the Initial Order
Denying CON Application No. CN1412-050D

DATE: October 18, 2017

Procedural History

1. By a 5-4 vote at its March 25, 2015 meeting, the HSDA denied HCA Health Services of Tennessee, Inc. d/b/a TriStar Southern Hills Medical Center's ["SHMC"] CON application, No. CN1412-050D, for the establishment of a freestanding emergency department near the Old Hickory Blvd. exit from I-65 in Davidson County (Brentwood zip code).
2. SHMC timely exercised its legal right to initiate a contested case to appeal the approval, pursuant to T.C.A §68-11-1610. Vanderbilt University Medical Center ["VUMC"] and Williamson Medical Center ["WMC"] intervened in the contested case.
3. The contested case (trial) was held on January 9th - 13th, 2017.
4. Sitting in place of the HSDA, Administrative Judge ["ALJ"] Mattielyn B. Williams issued the Initial Order on May 31, 2017, denying the CON application.
5. SHMC timely petitioned the HSDA for review of the Initial Order. Copies of the Petition and Responses in Opposition are attached.

The HSDA Must Decide *Whether* to Review the Initial Order

Agency Rule 0720—13—.03 provides as follows:

- (1) An Initial Order issued by an Administrative Judge, sitting alone, may be reviewed by The HSDA pursuant to T.C.A §§4-5-301, et seq., 68-11-1610, these Rules, and the Rules of the Secretary of State Chapter 1360-4-1. The HSDA may, in its discretion, decline to exercise any review of an Initial Order issued by an Administrative Judge, in which event the Initial Order issued by an

Administrative Judge shall become a Final Order as provided by the Administrative Procedures Act.

- (2) In such a review proceeding, The HSDA's review is strictly limited to the record which was developed before the Administrative Judge. No additional evidence is to be received or considered by The HSDA.
- (3) Such a review proceeding is in the nature of appellate review.¹ Each party will be given the opportunity to file a brief which should specify what action the party maintains The HSDA should take on the Initial Order. The HSDA may place reasonable page limitations on such briefs.
- (4) In such a review proceeding, each party will normally be limited to oral argument of thirty (30) minutes in length, including rebuttal.
- (5) At the conclusion of the review proceeding The HSDA may decide² that the Initial Order should be adopted in its entirety, or it may make such modifications to the Initial Order as it deems appropriate.³

The ALJ ruled that the action proposed in the application is not necessary to provide needed health care in the area to be served and that it will not contribute to the orderly development of adequate and effective health care facilities or services.⁴ Should the HSDA exercise review of the Initial Order, the focus would be upon whether good and sufficient reason otherwise exists to establish "Need" and "Orderly Development" by a preponderance of the evidence.⁵ If the HSDA elects to undertake such a review, it must be mindful that the Chancery Court would require a reasonably sound basis being provided in the Final Order to support a decision made contrary to the criteria and standards of the state health plan. Whether such reason exists depends upon the specific facts of each case.

¹ The ALJ did not review the HSDA's decision, but heard this case *de novo*, which means that arguments and evidence for and against the application were submitted anew and within the procedural and evidentiary constraints of the Administrative Procedures Act. By law, HSDA review is about whether the ALJ made the right decision in denying the CON based upon the evidence established during the contested case, not whether the HSDA made the right decision after reviewing the application and hearing presentations on 3/25/15.

² The HSDA must openly consider findings of fact and conclusions of law for the Final Order before it is issued. This does not require a motion and vote for each finding individually, but at least discussion and consensus on each, followed by a vote for the Final Order. More discussion would be expected by a reviewing court for findings and conclusions that differ from the Initial Order.

³ The HSDA is not required to defer to the ALJ's findings of fact and conclusions of law when issuing a Final Order. However, in its review of the HSDA's Final Order in the *Spring Hill Hospital* contested case, the Davidson County Chancery Court made clear that findings of fact and conclusions of law reversed/replaced by the HSDA will be held to a higher level of scrutiny.

⁴ The Initial Order did not find that SHMC had failed to demonstrate "economic feasibility"; the quality criterion had not been added to the statute prior to the HSDA's denial of CN1412-050D.

⁵ Generally speaking, that greater than 50% of the evidence favors the finding